UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590



By Facsimile and Certified Mail
Return Receipt Requested

REPLY TO THE ATTENTION OF:

November 21, 2007

C-14J

UT/Hamilton Sundstrand Corporation
c/o: Earl W. Phillips, Esq.
Robinson and Cole, LLP
280 Trumbull Road
Hartford, CT 06103-3597

Re: Southeast Rockford Superfund Site – Source Area 9/10 – Plaintiffs Response to Settling Defendant's CD Comments

Dear Mr. Phillips:

Enclosed please find the responses of the US Dept. of Justice, US EPA, the IL Attorney General's Office, and the IL EPA (the Plaintiffs) to the October 24, 2007 comments of UT/Hamilton Sundstrand Corporation (UT/HS or Settling Defendant) on the draft Consent Decree sent out with the September 2007 Special Notice Letter.

The Plaintiffs have attempted to address all issues and modifications raised by Settling Defendant. However, as you will see in our reference section, 'General Comments', the respective Agencies are still working out how the review and concurrence of UT/HS work at agreed upon RCRA units will be approached. Plaintiffs plan to incorporate the attached list of modifications into a new red-line version of the proposed CD for Remedial Action in the next few days and transmit a copy to you. Based on the abovementioned, it is probable that the red-line version of the CD may also incorporate some modifications that are not yet a part of the attached comments.

We look forward to hearing from UT/HS and anticipate a productive meeting on November 29, 2007. Please feel free to contact me with any comments or questions by e-mail or at 312/886-6613.

Sincerely,

Tom Turner
U.S. EPA, ORC, Region5

Enclosure

cc: Shari Kolak, RPM – U.S. EPA
Tom Williams, RPM-Illinois EPA

Frank Biros, Esq., U.S. Dept. of Justice
Beth Wallace, Esq., IL Attorney General's Office
Paul Jagiello, Esq., IL EPA-Legal

Victoria M. Haines, Esq.
U/T Hamilton Sundstrand
Rockford, IL

Southeast Rockford Groundwater Superfund Site – Source Area 9/10 – Remedial Action

USDOJ/EPA/IL ATG & EPA Responses to UT/Hamilton Sundstrand draft CD-10/24/07

General Comments:

Throughout the draft CD, there are proposed uses of the terms/derivations of terms such as, "reasonable", "timely", "as clarified in the SOW", "detailed itemized", "and significant", "or appropriate", "as appropriate" "or a circumstance" as modifiers to what is Model RD/RA language. We cannot agree to these terms because these often are vague and difficult to define; serve to alter the original meaning of a word or phrase that has been in place for a specific purpose; and/or, use of the modifier requires that a legal term of art or definition be re-interpreted if there is a dispute arising from the proposed word usage; and/or, the term implies that the June 2002 Record of Decision (ROD) and the approved April 2007 100% Remedial Design (RD) do not define the remedy. The Statement of Work (SOW) is a tool for implementing the remedy. It does not define the remedy. We understand that UT/Sundstrand is proposing to address sources and groundwater on and under its property as required by RCRA and CERCLA. That is, UT/Sundstrand does not propose to address sources in Area 9/10 that are not on its property. We propose that the CD be modified at the definition of 'ROD' and SOW to address the specific UT/Hamilton Sundstrand work to be performed at Source Area 9/10. As an additional general comment, the Model RD/RA Consent Decree, on which this draft CD is based, has been used by the Agencies for over 20 years and is generally accepted by the CERCLA PRP community, as evidenced by the numerous CERCLA settlements to date. Changes, other than those covering site-specific circumstances, are generally disfavored by EPA and DOJ management and would not be approved by those officials with authority in these Agencies.

Also, the Agencies are still determining the appropriate review process as between EPA and IL EPA for RCRA units to be addressed under this CD. As soon as appropriate language can be agreed upon, we will notify the Defendant.

Specific Comments:

Section I - Subsection "M" (p. 2) "Background" - the term "certain portions of" is not necessary because of changes EPA/IL EPA have made in the definition of 'ROD'.

Section II – Paragraph 1 (p. 2) "Jurisdiction" – We cannot agree to adding the term "and the Plaintiffs." Model language and CERCLA 122 require that US DOJ/EPA be able to respond to comments, challenge, and seek to amend or even reject a Consent Decree's terms depending on comments received and the response of the court.

Section IV – Paragraph 4 (p. 3) "Definitions" – "Future Response Costs" – We cannot agree to use of the term "reasonable." This is model statutory language based upon CERCLA. See general comments above. Also, dispute resolution provisions of CD address defendant's concerns here;

(p. 4) "GMZ" – Plaintiffs will accept defendant's proposed definition, except for language 'within the Site';

(p. 4) "Interest" – deletion of comma is acceptable;

(p. 4) "Interim Response Costs" – Again, as explained above, we cannot agree to use of term "reasonable." See above. Also, we cannot agree to use of the phrase "properties currently owned by Settling Defendant within the Site." "Source Area 9/10" to be restored;

(p. 4) "Performance Standards" –We cannot agree to use of the phrase "certain properties within the Site currently owned by Settling Defendant."" See above. Also, "as clarified in" is unacceptable. See above. Plaintiffs propose the following definition: "'Performance Standards' shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action for UT/Hamilton Sundstrand properties set forth in the Class I Groundwater standards and Soil Remediation Objectives of the ROD (pp. 27-33, 81-94), Section II of the SOW, and any modified standards established by EPA pursuant to the "technical impracticability" provision of Paragraph 13a";

(p. 4) "RCRA" – We believe use of the phrase "and any state analog" is not appropriate. Plaintiffs will provide citations to specific IL statutes and regulations, after determining the affected RCRA units at the UT/Hamilton Sundstrand property that will be part of the response work undertaken by UT/Sundstrand under the CD;

(p. 4) Plaintiffs propose the following modification: "'Record of Decision' or 'ROD' shall retain the current definition in the CD, and we will add, "For purposes of this Consent Decree only, Settling Defendant agrees to implement the ROD to the extent defined by the Statement of Work".;

(pp. 4-5) "Remedial Action" – "or RA" is acceptable. "as clarified in" is unacceptable. Plaintiffs propose "as described in.";

(p. 5) "Remedial Action Work Plan" – We do not agree to the proposed addition to the original text definition. USEPA/IL EPA will both have complementary review and concurrence roles on essentially all aspects of the activities described and directed by the CD;

(p. 5) "Remedial Design" This proposed change is acceptable.

(p. 5) "Settling Defendant" insertion of full company title and deletion are acceptable;

(p. 5) "SERGWCSS" is acceptable;

(p. 5) Plaintiffs propose the following modification: "'Statement of Work' or 'SOW' shall mean the statement of work for implementation of the Remedial Action, and Operation and Maintenance at or around the UT/Hamilton Sundstrand property portion of the Site, as set forth in Appendix C to this Consent Decree and any modifications made in accordance with this Consent Decree."

(p. 5) Plaintiffs propose the following additional definition: 'UT/Hamilton Sundstrand Property' shall mean the property owned by UT/Hamilton Sundstrand within the boundary of Source Area 9/10 defined by the ROD and depicted on the map attached as Appendix D, and areas where contamination from UT/Hamilton Sundstrand property has come to be located.";

Section V – Paragraph 5 (p. 6) "General Provisions" at "Objectives of the Parties" - all of the proposed additions are unnecessary because of plaintiffs proposed changes in the 'Definitions Section. Deletions to be restored;

Paragraph 7 (p. 6) "Compliance With Applicable Law" – Defendant's proposed changes to the last sentence of this Paragraph are unacceptable. Plaintiffs propose the following modification: "The activities conducted pursuant to this Consent Decree, if approved by EPA and IL EPA, in accordance with this Consent Decree, shall be considered to be consistent with the NCP and RCRA, as applicable";

Paragraph 8a (p. 6) "Permits" – We do not agree with the proposed additions to the original text. For reasons noted above and because responsibilities of Settling Defendant are described in model language of CERCLA, the NCP, identified ARARs (from the ROD), and applicable pollution laws;

Paragraph 8b (p. 6) "Permits" – We do not agree with the proposed addition to the original text. The concept of "license, approval or renewed permission or authorization from any third party" is too broad. This could conflict with 'best efforts' requirement of model language, e.g., 'Access/Institutional Controls' or other provisions;

Paragraph 9(a)-(e) (pp. 7-9) "Notice to Successors-in-Title" – We do not agree with the proposed additions to the text "a portion of", "such portion of", and "such real property within." Please note that this is model Institutional Control language, and our flexibility to alter it is limited. Deletions to be restored;

Section VI – Paragraph 10c (pp. 9-10) "Selection of Supervising Contractor" – We do not agree with the proposed additions to text, except as to add "with reasonable opportunity to review and comment by IL EPA" after "EPA" in the 2 sections of the text. The original text language gave Settling Defendant the protection of Force Majeure, where applicable. Deletions to be restored;

Paragraph 11a, c (pp. 10-11) "Remedial Action" – (11a), We do not agree with the proposed additions to text, except for "...and the RCRA Corrective Action Requirements." Other deletions to be restored. For Paragraph (11c), the plaintiffs propose the following modification to the first sentence: "Upon approval of the Remedial Action Work Plan by EPA, after a reasonable opportunity for review and comment by IL EPA; and, as related to RCRA matters upon approval of IL EPA, after a reasonable opportunity for review and comment by EPA, Settling Defendant shall implement the activities required under the Remedial Action Work Plan.";

Paragraphs 13-14 (p. 11) "Modification of the SOW or Related Work Plans" – We do not agree with the proposed additions to the text as written. At Paragraph 13a, plaintiffs are willing to accept the following modification to the proposed last sentence of the Paragraph, "Settling Defendant may propose, and EPA and Illinois EPA may, in their unreviewable discretion, consider that certain modifications be made to the SOW and/or work plans." Otherwise, please see previous discussions on the rest of the proposed textual additions. Deletions to be restored;

Section VII – Paragraphs 16-20 (pp. 12-13) "Periodic Review" –We do not agree with the proposed addition to text in Paragraph 16 as written. Plaintiffs are willing to accept the following modification to the proposed addition to the Paragraph's text, "...or as requested by Settling Defendant and agreed upon by EPA, after reasonable opportunity for review and comment by Illinois EPA,..." The proposed additions to the text of Paragraphs 19 and 20 are acceptable, with the addition of the above phrase after references to EPA in Paragraph 19.

Section VIII – Paragraph 22 (p. 14) "Quality Assurance, Sampling and Data Analysis" – We cannot agree to the proposed addition of "timely" to text. See general comments above;

Section IX – Paragraphs 25-29 (pp. 14-17) "Access and Institutional Controls" – We cannot agree to the proposed additions and deletions to text at Paragraphs 25a, 25b(i), 26, 27 and 28 as unnecessary for reasons discussed above. The proposed change to text at Paragraph 26c is acceptable. Deletions other than at Paragraph 26c to be restored;

Section X – Paragraph 30 (p. 18) "Reporting Requirements" – We do not agree with the proposed addition to text at paragraph 30 as written, and plaintiffs believe it is unnecessary since the "Modification" provisions of Paragraphs 13-15 cover this possibility;

Section XI – Paragraphs 36-41 (pp. 19-20) "EPA Approval of Plans and Other Submissions" the proposed change at paragraph 37 is acceptable. We do not agree with the proposed addition to text at paragraph 38b. The issue is already covered by paragraph 75 in the "Stipulated Penalties" provisions. Plaintiffs propose that references to EPA, after the first mention in Paragraph 36, shall include the phrase, "or, with respect to RCRA matters, IL EPA, after reasonable opportunity for review and comment by EPA,";

Section XII – Paragraph 44 (p. 21) "Project Coordinators" – The proposed modification to text is unnecessary since the "Modification" provisions of Paragraphs 13-15 cover this possibility;

Section XIII – Paragraphs 45-50 (pp. 21-24) "Performance Guarantee" –We do not agree with the proposed addition to text at Paragraph 45. This issue is already covered by the provisions of Paragraph 50a-b. The proposed deletion at Paragraph 45, "...of $7,900,000" to be restored in text. The proposed text change at Paragraph 47 is acceptable. We do not agree with the proposed text change at paragraph 48 as to the deletion of the term "or for any other reason". Plaintiffs require the discretion to protect the remedy from potential problems. And, Settling Defendant retains its right to the "Dispute Resolution" provisions of paragraphs 67-69. The proposed text change at Paragraph 48, deleting the word "whether" is acceptable;

Section XIV – Paragraph 51b (p. 26) "Certification of Completion" – the proposed addition to text is acceptable.

Section XV – Paragraph 53 (p. 27) "Emergency Response" – the proposed addition to text (and accompanying deletion) is acceptable.

Section XVI – Paragraphs 55-57 (pp. 27-30) "Payments for Response Costs" – We do not agree with the proposed additions to text at Paragraphs 55-57, except for Paragraph 55c and the substitution of the word "it" for the word "they" at Paragraph 56. Settling Defendant's concerns, expressed in the proposed language changes may be addressed by the "Dispute Resolution" provisions at Paragraph 69, as appropriate; the "Stipulated Penalties" provisions at Paragraph 75; or, above. Other deletions to be restored;

Section XVII – Paragraph 58 (p. 30) "Indemnification and Insurance" – We do not agree with the proposed additions to text at Paragraph 58. This is model language and the modifications alter the potential scope of liability for plaintiffs. Deletions to be restored;

Section XVIII – Paragraphs 61-64 (pp. 31-32) "Force Majeure" – We do not agree with the proposed additions to text at Paragraphs 61-64. These proposed changes have been addressed previously or in the general comments above. The last proposed addition clause at Paragraph 64, "...or in the case of Future Response Costs or State Future Response Costs, Paragraph 56...." is acceptable. Deletions to be restored;

Section XIX – Paragraphs 65-70 (pp. 32-35) "Dispute Resolution" – We do not agree with the proposed additions to text at Paragraphs 66, 67a, 68 and 70. Except, proposed addition of "(if any)" at Paragraph 70 is acceptable. Plaintiffs believe that non-binding mediation would be ineffective and a potential time-delay for a critical remedial activity. Other proposed textual alterations have been addressed in previous comments or general comments above. Deletions proposed in Paragraph 67b are acceptable. Other deletions to be restored;

Section XX – Paragraphs 71-82 (pp. 35-38) "Stipulated Penalties" – We do not agree with the proposed additions to text at Paragraphs 71 through 82. The proposed textual alterations have been addressed in previous comments or general comments above. At Paragraph 72, plaintiffs are willing to accept the following modification to the proposed 'Penalty Per Violation Per Day' amounts: "$1,000; $1,500; and $2,500, respectively," for the original timeframes of the 'Period of Noncompliance': "1st though 14th day; 15th through 30th day; and, 31st day and beyond, respectively." At Paragraph 73, plaintiffs are willing to accept the proposed 'Penalty Per Violation Per Day' amounts; however, the timeframes of the 'Period of Noncompliance' must return to the original text. Other deletions to be restored;

Section XXI – Paragraphs 83-89 (pp. 38-41) "Covenants Not To Sue By Plaintiffs" –We cannot agree with the proposed additions to text at Paragraphs 83 through 87g, and 88 through 89. Essentially, much of this section of the CD is model language based upon CERCLA Section 122 requirements. Also, the definition of "Site" shall be modified to reflect that the Settling Defendant will only be performing the remedial action on the 'UT/Hamilton Sundstrand Property' and, thus, will only receive a covenant for said property. Further, the proposed textual alterations have been addressed in previous comments or general comments above. Depending upon the addition of relevant RCRA corrective action units for closure under this CD, plaintiffs may reconsider reserving their rights as against Settling Defendant for issues related to Paragraph 87h. Other deletions to be restored;

Section XXII – Paragraph 91 (p. 42) "Covenants By Settling Defendant" – We do not agree with the proposed addition to the text at Paragraph 91. The definition of 'property' encompasses both real and personal property. The proposed deletion at Paragraph 91 is acceptable;

Section XXIV – Paragraphs 99-101 (p. 44) "Access to Information" – We cannot agree with the proposed additions to text at Paragraphs 99, 100b, and 101. The model language for the access to information provisions is meant to be of broader scope than simply "environmental conditions" information. As indicated in CERCLA 104e, such language also encompasses matters including issues of ownership, management, financial capabilities, and operational history. The privileges available to Settling Defendant are clearly defined in the original text. All deletions to be restored;

Section XXV – Paragraph 103 (p. 45) "Retention of Records" – We do not agree with the proposed additions to text at Paragraph 103. Plaintiffs will not agree to narrow the scope of model language provisions. Settling Defendant retains all privilege defenses based on federal statute, regulation and case law. All deletions to be restored;

Section XXVI – Paragraph 105 (p. 46) "Notices and Submissions" – the original text should be modified at, "As to EPA" to provide for the new EPA Remedial Project Manager (RPM) Ms. Shari Kolak. All other text remains the same.

Section XXIX – Paragraph 108 (p. 47) "Appendices" – Please correct text of Settling Defendant's draft CD for Appendices 'E' ('Notice/Declaration of Environmental Easement and Restrictive Covenants Form'); and, 'G' ('Declaration of Environmental Easement and Restrictive Covenants').